

BOARD OF ZONING APPEALS

Minutes

January 22, 2002

The regular meeting of the Board of Zoning Appeals of the City of Wichita, Kansas, was held at 1:30 p.m., on January 22, 2002, in the Planning Department Conference Room, Tenth Floor of City Hall, 455 N. Main, Wichita, Kansas.

The following Board members were in attendance: BICKLEY FOSTER, JAMES RUANE, FLOYD PITTS, JAMES SKELTON, present. JOHN ROGERS, RANDY PHILLIPS, and BRADLEY TIDEMANN, absent

The following Planning Department staff members were present:
DALE MILLER, Secretary, SCOTT KNEBEL Assistant Secretary,
ROSE SIMMERING, Recording Secretary.

Also present: Doug Moshier – Assistant City Attorney.

Also present: J. R. COX – Commercial Plan Review/Commercial Zoning -- Office of Central Inspection.

RUANE: Calls BZA meeting to order. The first Item on the Agenda is approval of the “Minutes” for our meeting of the month of December. They were submitted earlier in your packet. Does anybody have any questions, comments, corrections, clarifications?

SKELTON moved FOSTER seconded to approve the “Minutes” of December 18, 2001.

MOTION carried 4-0.

RUANE: With regard to the second Item on our Agenda, BZA2001-00063 was an Appeal of an Administrative Interpretation by Kurt Schroeder regarding a property located on north Rock Road. We were just advised that Item has been withdrawn by the applicant. Is anyone here on that particular Item? So we are then going to move to what you see as Item No. 3 on our Agenda, BZA2001-00071, a variance to allow an increase in building height from 35 feet to 45 feet on property zoned “SF-5” Single-Family Residential. The applicant is Westlink Church. The agent, is Russ Ewy, Baughman Company. The application’s general location is south of 21st Street North and west of Maize Road. First we will hear from Scott from the City Planning Staff.

KNEBEL: This Item is a request for a variance to the maximum allowable building height in the Single-Family District, which is shown in white on the zoning map here. The property is located south of 21st and west of Maize. It is this large parcel here. The site is the location of Westlink Christian Church. These are the building plans that were submitted. This is an aerial showing the surrounding uses. The building plans show the location of the building, basically right in the center of the parcel and then they also show the elevations. This particular slide here has very little of the building that actually exceeds the maximum building height. This portion right here goes up to 45 feet. This steeple, at the very tip here, I think goes up to 66 feet; however, steeples are exempted from the height restriction. It is just the habitable portion of buildings that have to meet those height regulations. So, on these next two aerials it shows the

large portion, the sanctuary portion of the building that exceeds the maximum allowable height and that is the reason for the variance request.

This is a picture of the site, and you can see that they have started the site work. They have poured some asphalt and so forth, so they are actually underway. This is west of the site and you are far enough away from the property lines that it is difficult to tell, but there are houses to the west, a solid large residential subdivision west of this location. North of this site is commercial development and commercial development to the northeast plus residential development directly east; as well as another church to the east. A small church compared to this one. South area residential, located at the rear corridor of the lot, and then immediately south of the front portion of the lot is some commercial uses. It doesn't show up very well, but I believe that is a doctors office in the middle of the picture there.

In reviewing this, as far as the criteria for granting a variance, the planning staff does think that all of those criteria have been met by the applicant. We feel that the property is unique just due to its sheer size. As you can see by the zoning district, all of the properties in white here, with the exception of, I believe this property down here, which is a cemetery, all of the properties in the white zone are significantly smaller than this property which allows for large setbacks.

The impact on the adjacent property. By providing setbacks of as little 300 feet from the commercial properties to the north to as much as 550 feet from the residential properties to the west, we feel like increasing the building height by 10 feet at these setback lines will not significantly or probably will have no impact on the adjacent properties just from the increase of height.

The hardship on the applicant. We feel like requiring the property to be all within the 35 foot building height would require a larger footprint of the building which is significantly more expensive and doesn't necessarily meet the goals of the community when it comes to constructing buildings.

As far as the public interest is concerned, we don't feel like there will be any determinately impact on the public interest.

The spirit and intent of the code. The height regulations are in the Zoning Code to provide for sufficient space to allow light and air to reach adjacent properties and to have some sort of compatibility between adjacent structures so that one does not tower over the other and this height increase would not cause either of those issues to arise.

Based on that, we are recommending that the variance be granted, and we are recommending that a condition be placed on it that the variance be only for the portion of the buildings that is shown in the approved site plans. Basically, that is in there so if they have quite a bit of land, if they chose to construct something else in the future and want a height variance for that, that would involve another application and that this would just be for just this one structure. Essentially that is what all of the conditions deal with. Basically they would have to build to the site plan and that they would have to obtain the proper permits and complete the construction within one year. I will open it up for questions.

RUANE: Any questions from the Board with regard to Scott's presentation?

FOSTER: Scott, on condition #2, I would just like you to think about, and we can come back to it later, but do you feel that is needed? If they ever want to add to it that can't exceed the height regulation of the current Zoning District anyway, and wouldn't this be a problem to them if they had to come back and add a room on or something like that?

KNEBEL: You might ask them if that is a concern of theirs.

FOSTER: You might think about that. Is that a necessary condition? On number one it already covers the height limitations for that particular item. What if they had to come back? They would have to get a variance.

KNEBEL: Typically, we do like to tie people down to a specific construction project when we are granting a variance, and so that is why we put it in there.

FOSTER: In this case it is a pretty big one with a big lot. They may want to add to it over a period of years. That is why I raise the question.

RUANE: Any other questions? Thank you Scott, now we will hear from the applicant.

RUSS EWY, BAUGHMAN COMPANY, 315 ELLIS, WICHITA, KS: We are in agreement with the staff recommendation and the staff justification for the variance. Pretty straight forward and well explained by Scott, so I really have nothing further to add other than to answer a few questions.

Condition number two, we had read that assuming that we simply meant to tie down the fact that we couldn't build a 45 foot building, say 300 feet to the west or 250 feet to the north. That is what we are proposing on doing with the sanctuary. That it would be 45 feet. That is what we are seeking the variance on. That is all that we are seeking the variance on. We would not necessarily like that condition to preclude us from building other facilities at some point in the future, provided that they would met the other parts of the Code.

RUANE: Russ, I have a question. Will there be any other, let's call them aesthetic distractions, lights or anything other than parking lights, or cell towers, or satellite towers, or anything like that?

EWY: There will be an asphalt plant in the northwest corner. Laughter. That was a joke. To my knowledge, no. The steeple feature that Scott mentioned is the only other type of architectural treatment that would be set apart from the building façade. It is a quite nice looking building, actually.

FOSTER: Russ, on number two, I have been sort of reading it here. Would you think what it means is that you would have to develop the proposed plans you have but I guess that it wouldn't prevent somebody from adding on to it. It doesn't say, limit to, or anything so I would think that you could come back.

EWY: Part of our justification of the height variance is the location of the building within the center of this large lot. I think that we would agree with the staff's intent that we wouldn't want to have this complex shift to one of it's boundaries that would perhaps create an impact. Again, we are comfortable with the staff comments understanding that any future addition that would require a BZA variance would be decided at that time.

FOSTER: Or it might be the regulations anyway.

EWY: Exactly, we are not looking for blanket coverage on the entire lot.

FOSTER: Rereading it again, I don't see that it would restrict you all from adding anything to what is there, and I like your idea that it places it where it is now.

EWY: We are comfortable with that.

RUANE: What other questions are there? Hearing none, who else would like to address this Item? Note that anybody that would like to speak to this has up to five minutes. You need to come to the microphone and state your name and address and explain in particular whether you are for or against and, if so, why. So would any of you like to be heard?

Theresa A. Palmer, 1884 N. Lark Circle, Wichita, KS 67212: I just wanted to know. First of all, I was wondering, could someone give me a visual of what 45 feet would be on an existing building? All the neighbors that have asked me to find out what might be comparable to 45 feet, a building that we might all recognize, like Century II, or something like that.

RUANE: That is a good question. Russ or Scott do you have an answer for that?

KNEBEL: It is about four stories; 45 feet would be. So take your pick as far as where a four story building is.

PALMER: And the steeple is 65 feet?

RUANE: That is correct. The statement was made that the steeple would be 65 feet.

PALMER: The other question that I had, that if somebody could point out lighting standards to us, and give us perimeters as to when they anticipate that the lights would normally be on. Those parking lights, we see the standards sort of but, we are not real sure how flooded our backyards are going to be with lights in the evening.

RUANE: Scott, would you begin, or would somebody from staff begin with explaining the light standards and in particular this case.

MILLER: They are prohibited by ordinance from allowing light to escape from their property. Whatever lighting that is used has to shine into the parking lots or whatever. It is supposed to be directed in a manner or have shielding in a manner that it doesn't escape their property lines.

RUANE: The second part of that question was as to the anticipated hours or times during the day when the parking lot lights would be lit. Does someone on behalf of the applicant or the church have information on that point? Let me ask the question again. The second part of her question was, what would be the hours of night when the lights would be expected to be on? Hopefully, you could respond to that part of her question.

AUDIENCE: We haven't really discussed that. Generally we will have programming things, probably until 9:30 or 10:00 at night. There might be occasional variance from that.

PITTS: I think he might need to approach the podium.

RUANE: Sir, would you please tell us what your name is?

AUDIENCE: Larry Pecenka, Executive Pastor for the church.

RUANE: Is it fair to summarize your remarks as saying it is not later than 10:00 p.m.?

PECENKA: There might be occasional times when we have a special event, but as a general rule not past 10:00 P.M.

PALMER: Okay, but will they be on everyday until 10:00 p.m.? Or will the lights just be on until 10:00 p.m. if you are having an event at the church.

PECENKA: They would be on whenever we are having events at the church.

RUANE: Any other questions that you have?

PALMER: No questions, no.

RUANE: Do you have a statement that you would wish to make?

PALMER: Yes, I am not real excited about the fact that those lights will be on after 10:00 p.m. I know that there are several of us that are not exactly excited about lights being on every night based on what we can see as to the amount of lights. I know that they are not permitted to, and I understand what you are saying about how they are not permitted to show. But I don't see how if there is nothing blocking our view, how that is not going to keep from shining into our backyard. We have no fences back there, at the back line of that property, so I don't see how there is going to be so few lights. As tall as it is, it looks like they are going to be shining into our backyard and into our living room windows and such, if they are going to have them on every night until 10:00 p.m.

EWY: I will make a few remarks. The question about what would 45 feet typically look like. I think, if one could picture a school gymnasium I think those are about the most common type of structure that would be about 45 feet in height. Again, this is only for a portion of the church building itself. I will go ahead and let the architect speak to some of the other concerns.

I would just like to point out that the subject at hand is the height variance and unfortunately this could develop as a housing district, as a school, or as this case as any church and the lighting would be permitted under the current regulations.

SCHAFFER, JOHNSON, COX, FREY, AND ASSOCIATES, P.A., TERRY WIGGERS, 257 N BROADWAY WICHITA, KS 67202: The question of the lighting fixtures, the lights are shown on this plan, kind of very smallish, small. The closest one to the property line is probably about 150 feet. These are focused lights. If you have noticed on the pictures that Scott put up, they are a boxed figure with a focused lens. Unlike say a street light where it shines in all directions, these would have no glare potential for someone looking from the residential property. They will light straight down on a very focused area on the parking lot. So, I doubt someone looking out of their kitchen window is going to notice the light other than a little bit of light on the pavement surface. So I thought I would point that out. If you would go back to that picture you would see what I am talking about, they are a box fixture without a lens on the sides whatsoever, just on the bottom surface.

RUANE: Those in attendance have been allowed to speak. Let's bring the conversation back here up to the Board. This is when we are to express our opinions, feelings, have a motion and reach a decision.

FOSTER: Scott, I would like to see us add a condition relating to the lighting. We know that is in the Zoning Regulations but something to remind the applicant and to reassure the neighbors. Something that J.R. can be checking on so that we have something measurable. So that he has heard it and knows what the problems are. I would like to see us pass this with the Secretary's Report but add another condition that is just the same, Dale, that is in the Zoning Regulations but as a reminder and something that could be looked at if there is any enforcement questions about it.

KNEBEL: We have Section 4b of the Unified Zoning Code. Is what you are referring to, adding a condition that the site shall comply with Section 4b of the Zoning Code? Is that what you are referring to Mr. Foster?

FOSTER: Can we spell out the words so that they know that? Make reference to it and spell it out what it requires.

FOSTER moves and PITTS seconds, that the Board accept the findings of fact as set forth in the secretary's report; and that all five conditions set out in Section 2.12.590 (b) of the City Code as necessary for the granting of a variance have been found to exist and that the variance be granted subject to the conditions set forth in the secretary report. Plus, a condition currently in the Zoning Regulations relating to control lighting on the site.

MOTION CARRIES 4-0.

RUANE: Now, calling Item 4 on our Agenda, Case Number DR2001-08, BZA Bylaw Amendments. In our advanced materials we had Sharon Dickgrafe's most recent iteration. Something that you have probably just received as you walked in today are some handwritten comments from Bickley. This matter keeps staying on our Agenda's and although I would sure prefer that: one, all seven of us were here; and number two, that Sharon was here if she needed to explain why she did something in particular; or number three, that we all had the opportunity to review and think about or adjust Bickley's comments. However, this is one of the briefest Agendas that we have had in a very long time, and it seems to me that since we have the time, and we do not have an audience, both of which I think are good things for this particular item, maybe we ought to at least pursue it as far as we can. If we can't reach a decision then I suppose the worse thing that could happen is that we table it, but I look for your input. I just want you to know that this is what the Chair is thinking.

SKELTON: I can agree with your comments Mr. Chairman. I think it is only fair that Sharon has a chance to explain herself if need be. But we have tabled this Item twice. The flipside of the coin, as far as seven members being here, we all knew that the meeting is today, I have had a month to get ready for it.

RUANE: We all knew it was on the Agenda.

SKELTON: Right.

PITTS: Mr. Chairman, as far as you know has Sharon had an opportunity to view Bickley's comments?

FOSTER: Let me explain Floyd's point. I would only briefly say that I have been working seven days a week for months and I finally got a weekend flexible enough that I could look this over. At 1:00 a.m. Monday morning I finished doing that and the staff was closed yesterday, and I brought it down this morning. So in all fairness, I did not realize Sharon wasn't here. Scott had a copy and hasn't had much time to look at it. So really it is kind of new to everybody. I could lead you through if you would like, a few of the points, what the problem that I found was...

RUANE: Floyd, when I knew of these comments I tried to reach Sharon and they said she would be in tomorrow so I haven't been able to talk to her either.

PITTS: I suggest Mr. Chairman, if you would like, because we do have the time to go over them, fine. But I don't know about some of the questions that are being raised. Whether we are going to go over the remarks that Bickley has made as well as the other things. For instance, are there any rules about missing meetings? That is the type of things that we should already know about and there has been a rule all along and whether or not it is writing or where it is coming from. The appointing Councilman is notified if you miss so many meetings within the year's period and I guess you are removed, but they can reappoint you; which they have done repeatedly.

FOSTER: I think that is in another rule that the City has for a City agency, so to speak. I thought some references just might be made to that so a new member could look on here. I have never seen the other, but we are going to see this as a new member and that is why I thought I would bring this up.

RUANE: Okay, let's try to do this in an organized, efficient manner and plow through this once with accumulative comments of both Sharon and Bickley. So look at the version that is attached to what you just got handed out today and we will crank through them once. At the end of that, I think we will be in a position to know whether or not we can take final action today.

SKELTON: I have some information here on this Agenda that was sent to me. I don't think it is at least on this copy here.

FOSTER: Such as, the list that Scott has is in there.

SKELTON: There is subsequent information.

RUANE: Let me show you what I got. We are on Item 4 on the Agenda.

FOSTER: Where did you get that?

RUANE: The attachment to his cover sheet.

FOSTER: That is part of the ordinance. It is already reflected in there. The problem that I found Mr. Chairman, just as a general comment, is that many of the problems relate back to the 1965 copy of this and of reusing something like that, and let me just on the first page, let me just give you an example very quickly.

RUANE: Know of all of our familiarity with the background of the issues and keep it a birds-eye view.

FOSTER: Okay, a birds-eye view. But, just look in the upper right hand corner of the first page and it talks about interpretation of the Zoning Ordinance. If I am correct Dale, the Zoning Ordinance is not the Sign Code. The Sign Code is a separate document.

MILLER: We need to reference the Sign Code as well.

FOSTER: So through here this keeps referring to the Zoning Ordinance and I think maybe once it mentions Sign code or something like that. So I think we need something that puts in that we are doing both is the point I am saying. That is something that doesn't occur through it just as an example. I think that throughout the whole thing that needs to be checked. Just as a matter of information, modification, there is not such a procedure in the Zoning Regulations under variances for modification. They are all variances, for example.

RUANE: So getting to the solution you advocate, striking of the word modification?

FOSTER: Striking the word modification. Now, the staff does some modification and things like that and adjustments, but not the BZA. He and She like half of this thing refers to he and then in the back it starts as he and her, and she. It just needs to be worked over to have compatibility. On the next page it talks about the duties of the Secretary but it never mentions who does the Agenda, which is kind of important to the group. It is just not on there is all that I am saying. The letter (G) on the third page, it just says appointed by the City Council, well are we? I think we are appointed individually, but I don't know exactly how the wording is, whether we are nominated by a Council member. I think the Mayor actually has his name on the material that we get. So, I don't think that this actually tells and it doesn't tell what the terms are. I just thought it wouldn't take much to put one more sentence in and to say actually how we are appointed and what the terms are.

RUANE: Something to consider on that, is, we could easily put in a recital of what the procedure is right now but in point and fact the City Council could decide they want to do it however the heck they want to and in no matter be bound by our Bylaws. Wouldn't you agree, Doug?

MOSHIER: That may be a problem

RUANE: Maybe the reason for leaving this so vague is to keep it dynamic enough in case they want change.

FOSTER: We could do that, but at least add the terms, four-year terms or something like that.

MOSHIER: I am not familiar, I don't have the State Law in front of me, but I am assuming that State Law doesn't set your terms at any specific number of years. So the City Council could set your terms to be two years, or four years. Again, I don't think that this Board has the authority to establish the term of the office of its appointees. That is the City Councils job.

FOSTER: The State Statue refers to three and four years as a choice for the City. But, I see the point, I think that is okay.

KNEBEL: What you are referring to Bickley, is Chapter 2.12 of the City Code.

FOSTER: Why don't we just put that in so a person can actually go to see how the appointments are made?

RUANE: Well, because the next time they rewrite the City Code and it is not 2.12, then they will be on a wild goose chase there.

FOSTER: No, they will add to it. I am not hung up on this, do you just like it the way it is? It doesn't tell you much, but maybe that is okay.

RUANE: It is an illuminating discussion because I didn't know that I was appointed for a three or four-year term, did you guys?

SKELTON: No.

FOSTER: Whatever you would like there. I just felt that it was rather skimpy not to give that information. Normally, Bylaws tell a little bit about terms, and how they are appointed or even when. This doesn't even tell when they are appointed by at least if we can refer back to something. We never see that. You never get a copy of that.

RUANE: Let's keep going.

FOSTER: The thing though that I think we really need to look at is (c), (e) and (f). Here is what the problem is. What we are talking about there in (c) on page 3, is if a member abstains, and then it goes on to say it shall be counted as a voting member for determining if a quorum exists.

Then down in (e) we talk about if a member has a conflict of interest, now it doesn't cover the fact that if a member disassociates himself, as Randy has from time to time and I think he does it very properly in my opinion, he is not part of the quorum. We even refer to that. We don't have him vote and so forth. There is nothing here that says that. It only says that if you abstain, you don't vote. But, we are talking about that he is not part of the quorum either and that was part of our problem last time because, if you read like the last sentence of (e), unless such permission has been granted, meaning to abstain, a member's silence in voting shall be recorded as an affirmative. So we could have counted but you can't count an affirmative vote on a tie vote. So I am just saying that this doesn't not really clarify.

It seems to me we have got three points here. One, there are members who abstain and it may be that they haven't or weren't here at the last meeting. They didn't hear the presentation, things like that, but they are still part of the quorum. Now today, if I had abstained, I don't know if we would have had a quorum or not here.

KNEBEL: You would have had a quorum but you wouldn't have been able to get four votes.

MILLER: You have to take (e) and (f) together.

FOSTER: I think the two are not working right together, Dale.

MILLER: What it is saying is that if there are just the four of you here and you decide to abstain they can still proceed because you are counted as a member present. They can still continue to vote. Without this language, once you abstain, then the case is done and it has to be automatically deferred to the next Agenda because there are not enough people to vote for it.

FOSTER: Dale, what I am getting at is that I think we need a provision that there are two different kinds of things. One is when somebody abstains and stays up here and they don't talk about it and they can't vote and their silence would indicate an affirmative vote to whatever the affirmative vote is. It doesn't go with a tie so to speak.

KNEBEL: If they abstain they don't have a vote.

MILLER: They have to go sit out in the audience and they are done until that case is over.

FOSTER: It doesn't really say that. It just says, not suppose to speak or so forth. I think it ought to say, and I think you have a choice.

KNEBEL: The only abstention you are being granted is an abstention from voting. It says specifically that if you are granted an abstention from voting that you shall not participate. Then, unless you have been granted this abstention from voting, your silence will be counted as an affirmative vote. If he calls for the vote, and you say nothing that is an affirmative vote.

MILLER: You have to get permission from the Chair to abstain, and if he refuses to give you the permission to abstain and you sit there in silence, then that means your vote is a yes.

FOSTER: What I am talking about is when someone has a conflict of interest and disassociates himself from the Board. We have referred to them as not being part of the quorum. There is not provision here for that is what I am saying.

MILLER: I don't think that we have been making any distinction on why anybody has been allowed to abstain. If they have asked to abstain and the Chair as given them that right, we don't care why because (f) says that as long as they are present, then there is a majority of the members present shall be required to pass a motion.

RUANE: There is probably a better parliamentarian then me in the room, but thinking back to Roberts Rules of Order, the quorum question means: can a valid meeting be convened? Has there been adequate notice? Prove of four out of seven showing, means this can be a valid meeting, satisfies provision of fairness, etc. But if you do make this modification that if somebody could be allowed to abstain and thereby do away with the quorum, you give that person essentially veto power to bring the meeting to a halt. I don't think that you want to do that.

FOSTER: That is right. You have to have that in there. I am talking about when somebody has a conflict of interest. They shouldn't sit up here.

KNEBEL: It says they are not allowed to participate in the discussions or the proceedings regarding the application.

FOSTER: But, it doesn't say disassociates so to speak. In some cities that I work for sometimes they even ask them to leave the room. I think that is a little drastic, but it is not good

to sit up here and still be looking at the members or whatever. We have had that happen at MAPC meetings and so forth and that is not good.

MILLER: If we add the word “disassociate” somewhere in (e) that will take care of it?

FOSTER: Yes, I think that if a person has a conflict of interest I think they should actually disassociate themselves from the Board, and they are not counted as part of the quorum.

KNEBEL: But, then if they are not part of the quorum, they could kill the case, which is the entire reason that you don’t want them on the Board if they have a conflict of interest.

RUANE: You can give your person with a conflict of interest a really dangerous level of power.

SKELTON: If there are four people here.

KNEBEL: If they truly have a conflict of interest, and there is only four here, they could just say here I am going to screw with you and you are not going to get your case heard today.

FOSTER: Well, since we have four votes, I see your point Mr. Chairman. Let’s just look back to the Dick’s Sporting Goods case. We were often referring to Randy as not participating. He is not part of the meeting. It was never indicated that he was voting. We had like a 4-2 vote. Nobody said that it was a 5-2 vote, and that is what it would have been.

MILLER: It would have been a 4-0-1, I mean, or whatever it was. He would have been listed as abstaining.

FOSTER: No, you are saying that an abstention counts as an affirmative vote.

MOSHIER: No, nobody is saying that. What is the problem here? The quorum and the vote are two separate tracks.

FOSTER: It says in (e) a member’s silence in voting shall be recorded as an affirmative vote.

MOSHIER: If he has not been granted a right to abstain.

KNEBEL: Right, you have to read the whole sentence.

FOSTER: He abstained and he didn’t vote, so he was silent so his vote should have been counted then according to this.

MOSHIER: Bickley, you are a lawyer, you should be able to read that language.

FOSTER: I am, and I am saying that it does not read right.

MOSHIER: I am real confident that it says exactly what everybody else in this room thinks that it says, but I will tell Sharon to give it another shot.

FOSTER: Well, look up here on (c). It says any member who abstains from voting, shall be counted as a voting member, and then down here...

MOSHIER: No it does not say that. It says shall be counted as a voting member...

RUANE: Wait a minute. There will be order. We don't have audience so that is all the more reason for order. Doug, you have the floor.

TAPE CHANGE

MOSHIER: If we change the next sentence to read any member who abstains from voting as allowed by subsection (e) below shall be counted as a member. We will strike the word "voting" and that just preserves the issue of a quorum and separates it by taking that word out. So that there is not confusion that a person who abstains is in any way voting. They are, however, satisfying by their presence at the meeting the requirements of a quorum, notwithstanding that they have been granted the right to abstain on a specific issue, case or both.

RUANE: Is that okay with you Bickley?

BICKLEY: Yes, that is my point.

RUANE: Then, if you look at the very tale end of (e) and part of the reason why I know this so well is because I think at my first meeting I ran a foul of this rule, because I had no idea that it even existed. If it existed back then, but if you go all the way through a proceeding and you just decide at the end I am just not going to vote on this item, this provides that anybody who has not been granted the right to abstain, who then at the tale end of the proceeding just decides not to vote, that person's action is construed officially as an affirmative vote.

It doesn't have anything to do with the quorum. Anybody that has heartburn or conflict or anything else if you don't resolve it at the outset of the case, then you are going to be voting in favor of the item.

FOSTER: I think that you need to clarify, that. I don't disagree with that. I just think that it needs to clarify the fact that if it is a tie vote, it does not go to make the decision.

MOSHIER: I don't know where that is coming from. I don't know what reason you have for that conclusion or what sense that makes, but I don't see it anywhere in here.

FOSTER: That is my point. It is not in here. In other words, if we have a tie vote the abstention of Randy would not have counted as an affirmative vote to make it 4-3.

MOSHIER: An abstention, never, never, under these regulations, as presently written would ever count as an affirmative vote.

RUANE: You have to read that very last sentence in (e) which says unless permission has been granted, a members silence in voting, which is different than abstention, is an affirmative vote.

FOSTER: I am saying if it is a silent vote and it is a tie vote, it doesn't change the vote, and I am sure that one could study this and figure it out. I don't see why we couldn't have a sentence that says that in case of a tie vote the affirmative vote doesn't count.

RUANE: Why would the affirmative vote not count?

FOSTER: Because the tie vote. You mean you want the decision made by an abstention?

RUANE: It is our job to make decisions. If somebody chooses to abstain at the last minute then...

PITTS: I am confused a little bit. Bickley you can save me some time. It appears to me, as I perceive what you are saying, you are indicating that sometime in the past that we had someone who abstained from voting because of a possible conflict of interest and then somewhere along the line their vote ended up counting as an affirmative vote. Am I misunderstanding what you are saying?

FOSTER: Well, that is the way that I read that this was written. When it said voting member until the word voting was taken out, that abstention allowed them to vote. That is what it said.

MOSHIER: Never, I am not here a lot, but I have never been aware that if anybody interpreted the rules of this body, as I believe they have existed, which was that if you wanted to abstain you needed to ask permission from the Chair and state a reason.

Either you had a conflict of interest, or you had another reason that fits within this statement here that you were not sufficiently informed that you felt that it was not appropriate for you to participate and then you were either granted or denied that permission. If you were granted that permission, then you withdrew from discussion or participation in the item and could not vote. I am not aware that anybody who was in that category ever had their abstention counted as an affirmative vote to approve a variance, or that in any way was ever counted.

FOSTER: That is what it says here. It says a member's silence in voting shall be recorded as an affirmative vote.

MOSHIER: You know Bickley, if I may have the floor, you are an attorney, and it is beyond me that you can look at that and pick that sentence up in the middle and continue after hearing us speak to continue to do that to misconstrue that in a way that I think the lay people on this Board understand crystal clear.

I don't know if it is because you wish to argue about this in some way that I do not have the kin to understand, but I am trying to say that if you look at that sentence from the beginning there are two exclusionary clauses before you get to the statement about a member's silence. The first one covers the specific eventuality of a person being granted the right to abstain; therefore, when it talks about a member's silence it is not talking about a member who is silent and who has been granted permission to abstain.

FOSTER: When does the affirmative vote apply then?

MOSHIER: When somebody who has not been granted permission to abstain sits mute when it comes time to vote. They don't say "Aye" when the Chair ask for affirmative votes, and they don't say "Aye" when the Chair ask for a negative vote. In that case, that person's silence is counted as an affirmative vote.

If you will watch Channel Seven, that happens all the time every week with the City Council. Many of those Council members for some reason don't wish to ever open their mouth, and they are counted as affirmative votes countless times every Tuesday.

FOSTER: I want to recognize that I completely agree with what you say, and I understand that. But, what I am bothered by is that this whole sentence does not clarify the fact whether someone that abstains whether they are part of the quorum or not. It doesn't clarify the fact that if you had a tie vote, for which we went three months on a tie vote, it doesn't clarify what an abstention does. That is my only point that I am making here.

RUANE: I think that if you read (c) and (e) together that is taken care of. Would it be sufficient to move this along if we delete the word voting from the second line of (c)?

PITTS: That was suggested. I thought that we did that. At least I scratched through it.

RUANE: I am trying to bring this back into a conclusion so that we can move on. Does that do the job for everybody, at least for the purposes of getting another draft circulated?

FOSTER: I will think of that point. You want to talk about (f)? The only point that I am making in (f) is that there is not procedure in here for voting on these amendments, and the only reference to voting other than on Variances and Appeals is what you see in (f). It refers to administrative or election matters and I don't know whether you want to consider amending these rules, and that is a question, as administrative. I would think that administrative is something different. I am just telling you that there is nothing in here that says how you vote on the amendments to these regulations.

If you want to go to page 11 it says amendments and it doesn't tell you how to vote on it.

RUANE: Perhaps I am an optimist, but I think that if there is no formula or prohibitions contained anywhere, we can take that as freedom to modify them in the best and most fair and reasonable way that we can figure out ourselves.

MILLER: Are you thinking that whether it is by simple majority or abnormal majority?

FOSTER: That is one of the issues. I prefer to call these Bylaws rather than Rules and Regulations. I do not think that they are Regulations. In that regard, a lot of amendments are required to be by 2/3 or even higher votes to make sure that you have a large enough group and that there are more than a majority of your members are in favor of it. I am not hung up on that, but it doesn't say anything on page 11 how you vote on these since it isn't an Appeal and it isn't a Variance is all I am saying. It was something that was in there in 1965 is my point. I think if Sharon looked at it, I think she could probably resolve that.

RUANE: Well, what do you suggest as a resolution?

FOSTER: I would think that we could simply say a majority for business transactions or something. In the State Statue for the Planning Commission, it refers to transactions of the Planning Commission. That would be one of the bylaws unless you want to make them a higher category.

RUANE: Would you be amenable to adding the language to the end of Section (f) so that...let me back up. All Board's need to have some ability to handle whatever housekeeping tasks may come before them, regarding, substitutions, changes in Chair or that kind of thing or other administrative things. How about we add on to that or election matters, or amendment or revision of these bylaws or whatever we are going to call them by simple majority?

FOSTER: Sounds fine to me if the members are satisfied. That is one of the more important things. Moving along, on (h) I think Sharon has done a real good job on the ex parte communication thing we asked. I suppose it would raise a question is when would you make a disclosure? This implies that prior to a motion a member would disclose their ex parte information. I just raise the question would it be good to have them do it at the beginning of the hearing? Would you want to know that at the beginning, or do you want to wait until they prepare to make a motion? I raise that as a question. Most of the time that I see it is that the disclosure is made at the beginning of the meeting, so that everybody knows it while they are listening to the other people.

RUANE: At the beginning of the meeting or that particular meeting on the agenda.

FOSTER: At the beginning of the item on the agenda, just literally say is there any ex parte discussion and then you go right on if nobody has any but you know it while you are hearing the people talking. Otherwise you wouldn't know that until you got to the motion, and it might be very important. Just say something about at the beginning of the hearing.

KNEBEL: Just say prior to the hearing.

FOSTER: Look at the top on page 5. It says an application for a variance or exception. Well it talks about getting the list, the names, address and all that. Well later on in here, and I am glad that Sharon put it in, that it does notify for an Appeal; and it has never done that before.

KNEBEL: I am not sure that was intentional though. I think that is one of the things that we need to clarify with Sharon.

FOSTER: On page 5 (b), number 3, she added the 200 feet for the appeal.

KNEBEL: I am not sure if that was her intention or an oversight, because if you look, that is contrary to what the Unified Zoning Code says should be done. The City Ordinance is very specific, and our bylaws should not conflict with City Ordinance.

FOSTER: Scott, the point is that in 5 (b), number 3, I was reading this to say that notice would be given within 200 feet for both Variances and Appeals and the fact that it is added in.

KNEBEL: I understand that. What I am saying is that the 200 foot notice requirement for an Appeal is contrary to the City Zoning Ordinance, and the City Code that establishes the Board of Zoning Appeals specifically states that the bylaws shall not be contrary to the City Ordinance.

FOSTER: You are saying the Appeal in the City Zoning Ordinance does not allow for notice?

MILLER: It does not require it.

KNEBEL: Correct, it does not require it. I think this Board, and maybe Doug can address this, that this Board would be overstepping their authority by requiring something over and above what the City Ordinance requires.

FOSTER: Let's talk just a little bit more. Think about this. You know this Day Reporting thing came. We had like eighty people that were expected to appear eventually on this. No notice would have been given to anybody other than a person who figured it out to appeal. At

the last meeting we had the Koch people and other people here on that sign. How did they know about it? They would have never have known about it. I don't know how they found out about it.

MILLER: The applicant has to put up a sign on his property.

KNEBEL: No, not on an Appeal. It is published in the paper.

FOSTER: It is published in the paper, I agree, but how many people read the paper all the time looking for an Appeal next to them. But, all I am pointing out that if (b) meant that they gave notice, three at the top doesn't say it. The two don't match.

KNEBEL: I guess I take that back. Here is actually what the City Zoning Ordinance says, "that notices shall be mailed to all applicant's and to such additional persons as shall be specified by the Board's policy."

FOSTER: So, we could do it if we wanted to.

KNEBEL: It does give this Board the leeway to establish a notification policy for an Appeal.

RUANE: I am in favor of that.

FOSTER: I would be in favor of that. I think it is important. The ones that we have had have been very important questions. We had Miner Mike here, an \$800,000 dollar mistake. We would have given notice to nobody, and yet we had, Floyd was here, and you recall that we had petitions from 600 people against it.

RUANE: In the interest of efficiency, is there anybody that isn't fully on board with the notion our taking, for ourselves, the opportunity to require 200 foot notice in an Appeal circumstance?

KNEBEL: The only thing that I might throw in on that for you to consider is that a lot of times people are filing Appeals of decisions where they feel like they have been unjustly treated. If you adopt this policy, then you are going to expend monies and then notify their neighbors and make all their neighbors aware of something that they may feel like their neighbors have nothing to do with.

FOSTER: Scott, I don't differ with you, but I would also say that the opposite is true. I am a Zoning Administrator for four cities, and many times on enforcements I find that when people feel that they have to come before a group and their neighbor is notified and that enforcement procedure, they may have a different feeling about what they are doing. So I think that it works both ways, is my only point. I think you need to decide Mr. Chairman, whether you want to give notice, and if you do the two things need to match that is all.

SKELTON: Bickley, is that what you were saying just a minute ago that if somebody is going to Appeal an Interpretation by the Zoning Administrator that they would have to have notice given to their neighbors that are within 200 feet on an Appeal, and that is not the way that it is currently now?

FOSTER: Right, there is no requirement nor, as Dale has indicated, not even a sign is put up.

SKELTON: So perhaps when an individual makes a decision on whether to Appeal or something, bearing that his or her neighbors will be notified may have something to do with whether he goes ahead or not is that what you are saying?

FOSTER: You would like to think that it doesn't. But in truth actually some of the people bring out things that we don't know. That has been my experience. I would say that 80 to 90 percent of them that we benefit from somebody in the audience bringing something out that the applicant never told us.

SKELTON: I think it is a good idea.

RUANE: What is the inconsistency that we need to resolve?

FOSTER: You see at the top of page (5), number (3), it just says an application for a Variance shall be accompanied by a certified list. To do that, we would have to say an application for a Variance or Appeal shall be accompanied by a certified list etc...

SKELTON: I think that is a very good idea.

FOSTER: In the next one, and I think this is a very interesting one, this is if somebody initiates a case and they do not have the money to do it. Does everybody know what the cost is? We are still on page 5, number 4. Dale, are we still \$400 dollars for a variance? Is that still a standard fee?

KNEBEL: You are looking at least that much.

MILLER: It just went up for the City. An Appeal is relatively inexpensive. I think it is less than \$75.00. A Variance, it depends whether it is commercial or a residential it would be in the \$400.00 range.

FOSTER: Number 4, though, what does it apply for a Variance or an Appeal or both?

KNEBEL: Either, any proceeding, a Variance or an Appeal. It is anything that you are authorized to hear.

FOSTER: So either one of these. But as I say Dale, is it still \$400.00 for a Variance?

MILLER: It varies it depends on whether it is a commercial or a residential request. The \$400.00 would be an average amount.

FOSTER: So the commercial could be more and the residential is less?

KNEBEL: The commercial is more.

MILLER: The commercial is like \$550.00 or \$500.00 now.

FOSTER: I think that this is an important thing. I don't know that it has to come to the Board. I think I would be a little bit embarrassed if somebody that had a genuine Appeal problem, that did not have the money to do it and so forth, they have to appear before this group. We don't know whether we are going to have an audience that afternoon, and maybe they bring their income tax

here or something like that. I just can't see doing that. I would rather give this job to the Secretary and let them make that determination.

MILLER: Well, until I read this, we haven't ever had anybody ask for this kind of exception, and our standard comment is that we don't have the ability to waive fees for the Zoning Ordinance. I didn't actually know that this was in here, to waive the fee. On the Zoning fees, we also tell people that staff does not have the ability to waive that because it is in a separate ordinance, and we don't waive fees. I guess we could either do as Bickley said, and Doug, I don't know, can we just take it out? The problem we get into with waiving fees is that as soon as you do it for one person then everybody else is going to line up, and they all have different stories on why they need it waived, and you just end up getting yourself in trouble.

FOSTER: You know Dale, I haven't had problem with people paying a fee because it is usually less in the towns I work in. But, when you start talking about \$400, or \$500 that could be a big chunk of money.

RUANE: Maybe this has all changed, but I look at the information from the Brandon Stevens Item that was number two on our Agenda, and the office receipt shows that he paid a fee of \$175.00, received by WL, for that Appeal of Kurt Schroeder's.

MILLER: Right, waivers used to be much more expensive, and then about five years ago they were dropped down to \$50.00, and now I think they are \$75.00 or whatever.

RUANE: This is \$75.00 not \$175.00?

FOSTER: That would just about pay for the advertisement. It wouldn't pay for notifying neighbors or anything like that.

KNEBEL: No. We definitely lose money on staff time for Appeals.

FOSTER: On Appeals, like Derby for example, they charge \$20.00, and we have never had them change it because they feel an Appeal is usually a hardship type of thing. I don't advocate that, but I am just telling you that is why people do distinguish between Appeals and Variances so to speak. You see the question. I just want to make sure that everybody understood that, and I just don't like the idea coming to the Board publicly for people to have to grovel to come in and do that.

KNEBEL: I think that is one that you should give us a chance to consider a little bit more and come back to you on.

FOSTER: I just think a little less intrusive way. I just made some remarks on others, and Sharon could just look at them. There is nothing in all of this that refers to the...I am on page 6, 2(b). There is nothing in this whole statement that talks about the five findings. I suppose the City attorney is going to say that maybe they will make it six someday, but at the moment it doesn't really stand out greatly in here. I don't care just leave it findings, but my point is there is nothing in here that says that this is a quasi-judicial hearing which should be fair and impartial. I think that ought to be somewhere up front in this whole thing. More or less, as part of the introduction and use the words, fair and impartial hearing.

MILLER: The 2.12.590 B reference is to the five statutory findings.

FOSTER: It doesn't say five, but it says findings doesn't it.

KNEBEL: No, it lists the five findings that you are required to base a Variance on.

FOSTER: Where are you, on what page?

KNEBEL: Well, looking at Section 2.12.590 B of the City Code.

FOSTER: Oh, that is what that is, okay.

RUANE: And it refers to all five findings.

FOSTER: I think it ought to say that. I don't think it ought to be a mystery what 2.12.590 B is, I think we ought to tell them what it is.

KNEBEL: Not a problem.

FOSTER: I suppose there is a quick answer to page 6, (d), in that I just wonder if you have had cases Dale, where somebody comes back to change a condition. Maybe a condition doesn't simply work for them or the condition has changed. Do we just have them come back as a change and have them pay again to do that? I don't mind doing that but I am just pointing out...

MILLER: I can't remember anybody who has done that, but that is what we would do.

FOSTER: Nobody has asked to come in and say, this condition is impossible?

MILLER: Not that I can remember.

FOSTER: I would just take out my comments on (d) then. That it is being handled. On (e) as you know Conditional Uses are not amendments, and this only makes reference to zone change amendments approved by the City Council, so anything that would be a Conditional Use...

MILLER: We would send that to the Planning Commission. If they were wanting, to change a condition of a Conditional Use we would send it back to the Planning Commission as an amendment to the conditions of approval.

FOSTER: Dale, what I am pointing out is that it says no application shall be advertised for a public hearing meaning for the BZA, until a zone change amendment is approved by the City Council, and I am saying not all of their actions are zone change amendments.

KNEBEL: I guess what Conditional Use could be granted that would have to be granted first before a variance could be granted? I could understand it for a zoning, whereas your wanting to vary a zoning district standard for a different zoning district than what your property is in, so you have to change the zoning first then get a variance to that standard. But Conditional Use standards are not varied by the BZA. They are varied by the Planning Commission. I can't think of what Conditional Use you would have to wait until the Conditional Use is granted before you could get your variance.

RUANE: So, (e) should be deleted in it entirety?

KNEBEL: No, (e) is needed the way that it is written. I just don't know that we need to add anything about Conditional Uses.

FOSTER: I see Scott's point. In other words you are saying that we have never had a Conditional Use that ever needs a Variance. Now, originally towers were Conditional Use, but there is no reason to have towers come to us anymore for a variance. I am satisfied.

KNEBEL: Well, I guess a tower is one thing that I could think of that you could get a variance for strobe lights. It wouldn't make any sense for them to get a variance for strobe lights when there is no Conditional Use to grant the construction of the tower in the first place.

FOSTER: I think the Planning Commission would make that decision in the beginning whether they wanted strobe lights or not.

KNEBEL: That is really the only thing that I could think of. There probably are others since we thought of that one in a minute or two.

FOSTER: Why don't you think about that, whether there would be any reason for anything other than a zone change. On the next item, on page, 7...

RUANE: Let's take a minute and read page 7 and see if there is anything we think needs changed. Does anybody have any questions or anything that they want to discuss on page 7?

SKELTON: Bickley, your main concern on page 7, (d) is the time required for mail to transport itself from point a to b?

FOSTER: Yes, we had a problem on the Day Reporting Center.

RUANE: I don't want to know all the details I accept your changes there.

FOSTER: It is just clearly, and down below we do closed sessions and not executive sessions, as I understand it.

RUANE: Would that include conferring with our attorney?

MOSHIER: I will look at the Statue.

FOSTER: There is a copy of the State Statue on the back page of your material Doug.

MOSHIER: But, this talks about hearings and official actions, and I think that is probably a more appropriate word. Any consultation with counsel wouldn't be a hearing and shouldn't involve official action, but then when you take the official action you have to take, that ought to be in open session, and the hearings are all in open session. I think that is probably a good idea to use the word closed.

FOSTER: Dale, we have had this problem where people wish to continue a case, and the Item on the very top of page 8 just doesn't refer to that. It allows us to go ahead and take action if they don't show up. But there is nothing there about what to do we do when they wish to have it continued and they let you know ahead of time. There is nothing in here as I have seen it.

SKELTON: That makes sense.

MILLER: We can put language in there.

FOSTER: I think the member ought to look at page 8, (f). We give 15 minutes for the staff and then 15 minutes for the applicant regarding an Appeal. But we are talking 5 minutes, as you remind people, for a Variance, and I have some trouble charging people \$400.00 and giving them 5 minutes to convince us of something. I would like you to reconsider that we have enough time to do, and I don't see why it couldn't be 10 minutes, if necessary, or something like that, and this means that the Board has to vote to give them more time. I just think that 5 minutes is not enough.

RUANE: Countered to that, I would like to see this stay 5 minutes I think that is useful because it is in the materials that are furnished to the applicants by staff. As they know, they are going to come here and prepare for a hearing. If they can't simplify their position down to a presentation that can be made within 5 minutes, then they have not really figured out what their goal or gripe is. I think you can note that I am not a real stickler to that 5-minute clock, but if you would like me to be, I will be more so. But, as a Chair I find it useful to have this 5-minute rule. When we have a group that have their pitch forks and torches, it is handy to try and handle it more efficiently.

FOSTER: This is not talking about the other people in the audience. Page 8, (g), refers to those people. They get 5 minutes, no problem. I am just thinking this page 8, (f), refers to the applicant who has paid the \$400.00. It seems to me that they ought to have a little more time to present their case. That is my only point.

MILLER: We give them 10 minutes at Planning Commission, and that is what I thought that we had here, was the same rule. The applicant gets 10 minutes and then anybody that is either for or against it gets five minutes a piece. Then the applicant get 2 minutes rebuttal is the way that it works there, for whatever that is worth.

FOSTER: Do you notify them that they have five minutes when you send a letter out to them?

MILLER: At the start of every meeting we have a lengthy statement that explains that. Now whether they listen to it or not, I don't know, but we do tell them at the start of every Planning Commission meeting that this is how the meeting is going to be run.

TAPE CHANGE

FOSTER: Many times we have lay people here that have not paid an attorney to summarize it and that kind of thing. I don't see that 10 minutes would be bad. At least we would distinguish their efforts from the other people appearing.

PITTS: I think you are absolutely right. I can't recall of any case that they have asked for more time, and it has not been granted.

FOSTER: I completely agree with you, and if we were not writing this, we wouldn't even be talking about it. Even Dale thought that it didn't have 5 minutes in here for the applicant and you are running the timer.

KNEBEL: We have been giving them 10 minutes.

MILLER: When we made that decision kind of informally, I thought your decision was to follow the same rules that Planning Commission did. So it didn't make any difference to me whether it was an Appeal or Variance, I was just doing the 10, 5, and 2. I don't care one way or the other. I think the argument that we used for the 10 minutes for the applicant was that he had the burden of proof and that it was his responsibility to try and prove that his case was correct more so than it was for the anti-folks to argue that they were correct I think that was the rationale, I think, for the Planning Commission. This is a little different kind of venue where you have the five standards that they have to meet, and they either meet them or they don't.

FOSTER: That gives them a minute each.

RUANE: I really don't care.

SKELTON: I think 10 minutes is fine, and that is more appropriate.

PITTS: I don't have any problem increasing it to 10 minutes.

FOSTER: I think it would be a little bit easier to be a little bit more consistent. There are people who appear before both groups.

PITTS: If we are going to be that close in observing this action, perhaps we should think about situations where you have got 80 members of a group. We might want to limit their time as well.

RUANE: We are talking about page 8, (f), 10 minutes for the applicant and (g), I would strongly want to stay at the 5 minute rule.

KNEBEL: So on (g), maybe we should add each speaker to be limited to 5-minutes unless such time is extended or lessened by the majority vote of the Board.

MILLER: The Planning Commission, if they see a lot of people speaking they have dropped it down to three minutes a piece instead five.

FOSTER: Why don't you say limited to five minutes unless the Chairman determines that three minutes would be needed because of the size of the number of speakers.

RUANE: Let me pose a question, looking at the last sentence of (g), do you believe that we can only have an equitable and just public hearing if every single audience member who wants to speak gets the opportunity?

FOSTER: We are supposed to.

RUANE: We are supposed to, if we dictate in these bylaws that we do. Is there another requirement otherwise? Is there another requirement that comes from elsewhere?

FOSTER: There is nothing that tells us how much time. It is just whatever you put in front them.

RUANE: No, my point is, can the hearing close without every person desiring to speak getting an opportunity to speak?

FOSTER: No, you have to allow them to speak, would be my opinion.

MOSHIER: I don't think that is true, I think the Chair and the Board can set rational requirements in the interest in time. The one example that I have is a case, I don't remember if it was a court of Appeals or a Supreme Court case, in the City of Wichita's procedure in handling annexation hearing where they established a five minute rule when people got to five minutes they made them sit down. People asked them to speak longer and they said no. You are just saying things that we have said before. There is no reason for you to speak, sit down and they cut off the public discourse at some point when they felt that they were hearing things repeated and were hearing nothing new. The Supreme Court found or a court of Appeals found that was extending due process by having notice of the hearing, having an opportunity to be heard. By an opportunity to be heard did not mean an opportunity for a requirement that every person who wished to be heard got to speak as long as they wanted about anything that they wanted.

RUANE: So I would advocate in order not to waltz ourselves right into the problem, that case resolves that we delete this last sentence. What I would do as a Chair, and I think any other Chair would do is turn to the crowd, if you have a meeting like that, and say do any of you have anything to say that has not yet been brought up? Are there points of view that have not yet been expressed? I think that in order to have a fair hearing you don't need to have the cumulative of being able to see that these 19 people all say the same thing, and those four people say the different. Because if they were voting there wouldn't be any need for us. But, I think that we need to hear the various points of view, and that is more important then giving every single person an opportunity to be heard.

FOSTER: What Doug, if I understood he was saying was, that the court case said that limiting the time was appropriate. It didn't say, and I didn't hear you say Doug, and maybe it goes on, but did the court say that you didn't have to hear everybody?

MOSHIER: Yes.

FOSTER: I didn't hear that from what you were saying.

RUANE: But, if we had this in our bylaws, and we don't hear from everybody then somebody certainly has grounds for appeal across the street.

FOSTER: How would you change this?

RUANE: I would delete the entire sentence, the last sentence.

KNEBEL: I think the first sentence probably needs a little work too.

FOSTER: The last sentence in (g)?

SKELTON: You're wanting to go the other way though, Bickley?

FOSTER: No, the only point that I was making is, actually in our deliberation, as I understand it, is part of the hearing and so when you close the hearing out there. You are closing the public

portion of the hearing. The whole thing is not finished until you make the motion and vote. That is part of the hearing process as I understand it. I was just saying that the public portion of the hearing was closed. Now, if you want to take out the whole sentence, that is something else.

KNEBEL: I think we understand what you want and can fix that one, or present something to you to address those issues.

FOSTER: Now, what about, this talks about a residential address. Is that a good idea or just ask for an address?

KNEBEL: Any address that they can receive mail at is fine.

FOSTER: I think we can just strike the word "residential". Because, people may give their commercial address. There is some confusion in here about handling Appeals and Variances. Like on page 9, (j), it talks about a motion to approve deny or defer and in other places, it talks about a motion to grant rather than to approve and in other places about an appeal is different, and I am just saying that you ought to go through and make sure that it is compatible.

RUANE: Your point is that your desire consistency?

FOSTER: I didn't see anything wrong with that.

RUANE: I am just trying to make sure that I understand you. Let's just try and shrink it down. Mark next to (j) consistency throughout the whole text is a problem. Let's head this horse to the barn.

FOSTER: See the same thing happens in (a). There is no consistency. All of that has to do with consistency. Let's go to (c). There, now the way that this is written, it still requires four votes, and I am not against that if that is what the Board wants. I thought we were talking a majority of the members present and voting. I am a little confused as to what was desired. So I thought that we ought to talk about when it says, in other words are we going to have a majority of the members present and voting, or are we going to have a majority of appointed? That is the issue here.

SKELTON: I interpret this as just being, assuming a quorum exist, the majority of the quorum.

FOSTER: You see it says members appointed.

SKELTON: Appointed and qualified everybody here is appointed and qualified here right?

RUANE: Qualified, unless you disqualify yourself by removing yourself by declaring a conflict and going to the next room or someplace.

KNEBEL: Actually the qualification is the oath of office that you take.

RUANE: No kidding, it doesn't have anything to do with abstention?

KNEBEL: Right, so the way that this is written Bickley is exactly right. It would require four votes to approve any application for an Appeal or a Variance.

FOSTER: I am not against continuing that.

MOSHIER: It doesn't actually read that way. It has been changed. It resolves it, because it now resolves it on the side of denial. But, Bickley is correct, the way that I read this, and I think the way Sharon intended it, was that you would need, at the present time, I think that it is conceivable that you could have six people which would still be four wouldn't it. I think you might have a person sometime who is appointed and not qualified because they moved out of State or something, and they can't continue to serve until their successor is appointed because they don't live here anymore. So you would then only have six people appointed and qualified. It doesn't change the numbers any. It is still four. You have to have two that were disqualified before you drop down to three, so the answer is that you are still going to need four votes, but the difference here that I think is substantive is that now instead of it just being kicked over for ever, and ever, it will be denied.

RUANE: And once you have a final decision, if the applicant feels aggrieved they are not stuck in this never, never, land over here.

FOSTER: The second sentence that is why I would add, in other words, the second sentence in (c) is talking about a tie vote.

KNEBEL: Not necessarily it could be 3-2 and that would apply.

FOSTER: You are right.

SKELTON: I am just curious. Somewhere in the interpretation if we see that it comes about to have four votes when I see a majority of the Board members and I see that 4 is struck, there how is that interpreted four votes?

FOSTER: Because it says appointed and if seven are appointed the majority of seven is four.

KNEBEL: Right, see if there is only five members appointed then it would be 3 because that is the majority of five.

RUANE: It is not driven by who is at the meeting?

MOSHIER: But, you can tell Sharon to do that, if that is your message. I will be glad to tell her that is not right that you wanted it to be the majority of the members appointed. That changes the structure of this because back at the one that Bickley talked about earlier there is a definite distinction in these regulations between administrative and election matters and substantive matters on the decisions of Appeals and Variances. There seems to be, at least historically, a feeling that this Board should have a higher burden of affirmative votes for those substantive matters that your Board is constituted to decide day to day, versus those administrative and election matters, which can be if there is three people here and somebody abstains and it is a 2-1 vote to do something that is good enough but not for Variances or decisions on Appeals. But, in this case you can change that if you want to.

RUANE: I think we are all in agreement that Sharon's change did do what we asked her to do such that we would not have gridlock in our decision making process.

FOSTER: The second sentence handles that. So we would still have four votes. The second sentence would solve the problem that it is automatically not approved.

KNEBEL: Planning staff and Sharon talked about having it just be a majority of the Board members present. But like Doug said you have got four people here and one declares a conflict of interest, then two people can grant a variance under that.

FOSTER: I think that if we solved the tie vote I would like to leave the four. Variances are something that should be a little bit harder to get. Nobody else in the City gets it but them you might say.

Moving along (d) at the top, an applicant may withdraw his application, anytime prior to the adoption of the resolution. I just thought we might pen that down. When did we adopt the resolution? Should we say prior to the motion? Would that be a little clearer or after the vote? When does a person get to withdraw?

RUANE: I think the adoption of the resolution is when the matter passes.

KNEBEL: Yes, after you have got an affirmative vote.

FOSTER: Why don't you say by vote? I just had to stop and think. When does that occur? It may not be as clear to everybody is my point.

On (f), the last sentence, the Board shall determine whether such plan or document satisfies this previous requirement. It doesn't say anything about notifying the applicant again, I don't believe. You might just check that out. You with me on that Scott?

KNEBEL: Let me read the whole paragraph.

FOSTER: It says to schedule the meeting and all that, but it doesn't say anything about notifying the applicant.

The letter (g) I don't feel strongly about it, the last sentence, the Secretary shall notify the applicant that the matter is to be reviewed by the Board. I suppose the implication is for compliance, and I just added for compliance if you think that might clarify.

On (a) down there says duly verified and that is an old terminology. Doug, what do we use today? I put notarized or acknowledge, but I am not sure what verified means.

RUANE: I think as an Appeal you want it to be verified a sworn statement.

FOSTER: What does verified mean?

MOSHIER: Verified means somebody says that what is in there is true and correct to the best of their knowledge. Acknowledged, just says I signed this and someone watched me sign it and this is my signature. Verification, is probably the appropriate word there in my opinion.

RUANE: Some pleadings are required to be verified.

FOSTER: How do you verify?

MOSHIER: You just say those words, "I swear the contents, of this are true and correct to the best of my knowledge and sign your name" and then it is notarized that you signed it.

RUANE: And the reason for that choice is generally for something like that unless you can't have people come in and file these kinds of request for rehearing stating to the best of my knowledge and information in order to initiate the process they have to willing to swear that this controversy really exists, because here is what happened.

FOSTER: In other words that is an acceptable word that somebody is going to understand? I just suggested that (a) and (b) be combined. Some words have been cut out, and for the first time we see the word Bylaws down there, and I think that this ought to be called Bylaws rather than Rules and Regulations would be my opinion.

RUANE: Is there any particular reason?

KNEBEL: The only point I would add to that is that the City Ordinance says that you shall adopt Rules of Procedures so perhaps we should call it that.

FOSTER: The State Statue says Rules, so I don't have a problem with Rules. But I don't like the word Regulations. It sounds like we are adding Regulations, and we are not doing that.

RUANE: So these are Rules of Procedure?

FOSTER: You are leaving in the word Rules throughout and taking out Regulations. Is that what I am hearing?

KNEBEL: The City Ordinance says that you are to adopt Rules of Procedure, so it seems like that is what we should use.

RUANE: Regulations is kind of a hot button, because one might take the inference that we are expanding the authority or interpreting the authority given to us.

FOSTER: On page 11 (a) it says amendments may be introduced at a meeting and voted on, and it doesn't say how.

MILLER: If you look at (f), on page 3, it says a majority vote in matters regarding administrative or election matters, so are the Bylaws something other than administrative matters?

FOSTER: I don't know.

MILLER: I guess on (f) where it says a majority vote of the members to pass a motion regarding administrative or election matters, I would have, if somebody asked me, said this is an administrative matter, but I could be wrong.

FOSTER: I just think that amendments are more important than administrative matters. This is affecting our whole Rules.

RUANE: What is the solution? Do want a super majority?

FOSTER: I don't have a problem with a majority. I am just saying that I am not sure the word administrative covers the voting for amendments to these Rules.

RUANE: But, if the standard is the same then let's not split the hair.

FOSTER: Let's just add the work Rules, administrative and election matters so to speak.

RUANE: Going to these other notes, sure we can have the Chair sign off on these and have them attested by the Secretary. What are the rules about missing meetings?

MILLER: The City has rules, that if you miss more than three consecutive meetings, then that is brought to the attention of the Council member, the person who appointed it. Technically, Doug can correct me if I am wrong, but technically you are removed from the Board until the Council member either reappoints you or appoints someone to take your place. Now, we have had in the past a member who was gone three consecutive meetings, he had reasons, explained those to the Council member, and they reappointed him, and he continued to serve as if nothing had happened.

We have had other situations where there have been three consecutive, and they have been thrown off, and they appointed somebody else. There also a rule about more than 50 percent of the meetings in a given year. I believe it is on top of the three consecutive meetings.

RUANE: So there are Rules. They do not need to be republished in these Rules?

MILLER: I personally don't think that it is necessary, but if the Board thinks that we need this all in one place for convenience, we could do that.

KNEBEL: Really these are the Rules of Procedure for the operations of hearings before this Board. Not really the Rules of how this Board was formed, and what the membership is composed of, and how they are appointed, and all those types of things. That is all in another set of City Council Bylaws, if you will, that deals with the Board of Zoning Appeals, the Park Board and all the other Boards.

FOSTER: You know is there something here that we need right at the beginning? Where do we get this? Where do we get the right to do this? In other words, it comes from the Zoning Regulations? It comes from what else?

RUANE: Let's finish down to page 11, and then I have a response to that. Should a member abstain if they are in the notification area? Well, if they are in the notification area, it would seem quite evident that they have some sort of a conflict, and they should abstain.

FOSTER: I just wondered if that would be an abstention item. That is all.

RUANE: If they got a dog in the fight, they are deemed to have an interest by their proximity to the subject property. Does that surprise staff?

FOSTER: Your neighbors may want you to vote a certain way. I would rather get out of that and ask to abstain if I get a notification, because you don't want your neighbors asking you one way or the other.

PITTS: Suppose my neighbor is the one that wants whatever it is done, and I don't want it to happen. I should abstain from voting on it?

RUANE: Yes, the member should abstain. No, these rules should not be so specific as to cite that as a particular reason why. I think it is covered generally elsewhere.

FOSTER: I am just asking if somebody asked you that, what is the rule?

RUANE: If you followed Robert Rules, to the extent that I know them, I would be fearful if we were to provide a strong statement that Robert Rules are to be followed in that it would give potential appellants a real leg to stand on that the official protocol of Robert's wasn't followed.

FOSTER: I don't differ with you. There are a few things, and you brought them up. Let's say that someone made a prime motion, and then somebody makes a substitute motion. You vote on the substitute motion first. There are maybe three or four things like that that are sometimes put in Bylaws for that reason.

MOSHIER: I have a suggestion. This is a quasi-judicial body, and I think that you run this somewhat like a courtroom when you are doing hearings. Motions that you make are fine and well and good, but it is still the ultimate decisions and the resolutions that implement what you do, so if you screw up a motion and don't vote on it right, you still are going to adopt and vote for a document which is just what you went through with the rules, so I don't think you need to worry too much about niceties and parliamentary procedures, when you are not a parliamentary body. You are basically a judicial body.

RUANE: We are going to allow twenty five to thirty minutes on next month's Agenda to complete this Item in light of this discussion, and everybody has made careful notes. Let me make one comment as to why I think that this comes up and that is there is, or if there is, any orientation when one comes on this Body, it did not prepare me to be Chair. If I have a copy of the Bylaws I don't know where they are. This stuff is very helpful, but as these books stay in the room, I am always busy and really only open this to read the motion to either deny or grant, but other than that, if I am charged with the responsibility of knowing this stuff, at least let me check it out.

MILLER: We typically do have a about an hour to an hour half orientation with members, and they get their own copy of the Zoning Code and we give them a copy of the Bylaws. Generally we go over procedures that go on here and answer questions as best we can.

RUANE: Based upon the questions, confusion and input over these Bylaws, would it appear that the orientation did its job for the four of us that are here, or am I just the lone idiot?

MILLER: I think your question was whether it prepared you to be Chair. It probably doesn't do that, no question about that. There are, and I think as Bickley has pointed out, these Bylaws are a series of holdovers from probably the get go, and when we dropped the Use Exceptions, they weren't cleaned up very well. There is no doubt about that, and so that has led to some confusion in here. Rightly or wrongly, I think this Board has operated, at least from a staff's perspective maybe there has been a little more informal kind of management of it than maybe some of the other Boards, that may have lead to some of the confusion as well. That is probably my fault in terms of the way that we have handled it over the last 10 or 11 years or so.

RUANE: I really would only have a concern if your candid input would be the way things are going we are having too many appeals across the street or it is taking too much time, or we are exhausting too much of staff's resources. The proof would be in the outcome not necessarily the process.

MILLER: We think you are doing a pretty good job as far as that goes. If that makes you feel better, then we are pleased.

RUANE: I will shut her down there then. J. R., do you have a report?

FOSTER: I would like to thank the members and the staff for their patience in going over this. I learned some things too. I had questions, and some of these were questions as well as comments.

RUANE: Thank you for your effort.

J.R. COX, Office of Central Inspection: I have two BZAs to report on today. The first one is 1833 N. Market, BZA2000-00070. It was a side yard setback variance, and it is in compliance. The second and last is BZA2000-00052.

PITTS: I am having a problem hearing?

FOSTER: I can't hear him either.

COX: I have been ill for the last week and one half. I will try and speak up. The second and last BZA2000-00052, it is located at Keith and Ryan. It was two separate variances a parking reduction, and a front yard setback reduction, and it was in compliance. If you have any questions, I will try to answer them, if not my report is completed.

RUANE: Any questions for J.R.? We stand adjourned. Thank you all.

Meeting adjourned at 3:25 p.m.